



TOWN OF FAIRHAVEN, MASSACHUSETTS

CONSERVATION COMMISSION

Town Hall · 40 Center Street · Fairhaven, MA 02719

Staff Report

Date: June 3, 2019

To: Conservation Commission

From: Whitney McClees, Agent

Request for Extension: **Hiller Ave, Paul Street, Timothy Street (SE 023-1230)**

Brush cutting and clearing. Request due to ongoing clearing of brush for access pertaining to additional permitting.

MassDEP File #: SE 023-1230

Documents Reviewed: Notice of Intent and associated attachments, current Order of Conditions, Extension request from applicant, 310 CMR 10.00, Fairhaven Wetlands Bylaw

The applicant has requested an extension of three years to June 27, 2022 due to “ongoing clearing of brush for access pertaining to additional permitting.”

The Order of Conditions only permitted the following:

- No more than 10% of land area may be cleared
- Brush up to one inch can be removed ONLY
- No clearing within 50’ of wetland line
- No heavy equipment allowed

Request for Certificate of Compliance: **214/216 Huttleston Ave (SE 023-1206)**

Construction of an office building and associated parking and utilities at the property located at 216 Huttleston Avenue within Buffer Zone to Bordering Vegetated Wetlands.

MassDEP File #: SE 023-1206

Documents Reviewed: As-built plan provided with Certificate of Compliance Request, Order of Conditions for the project, original plans submitted, CMR 310 10.00, Fairhaven Wetlands Bylaw

The Request for Certificate of Compliance was submitted with an as-built plan as required by the Order of Conditions. The As-Built is dated January 22, 2015 and is signed and stamped by Steven D. Gioiosa of SITEC.

The letter from SITEC states that the work authorized under the Order of Conditions has been completed in substantial compliance with the approved plans.

There are some slight deviations from the original project plans, but it doesn't appear that they substantially changed the overall project.

CON-19-037 497 Sconticut Neck Road

Notice of Intent filed by Martha Tichon for the removal of a horse paddock encroaching on Bordering Vegetated Wetland and the creation of a new paddock in an upland area at the property located at 497 Sconticut Neck Road, Assessors Map 29, Lot 28B. Work to take place within the Buffer Zone to Bordering Vegetated Wetland.

MassDEP File #: SE 023-1291

Documents Reviewed: Notice of Intent and associated attachments, most recent site plan revision dated 5/22/2019, Peer Review Report from LEC Environmental, 310 CMR 10.00, Fairhaven Wetlands Bylaw

Resource Areas: Bordering Vegetated Wetland (BVW)

Significance: BVWs are likely significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution, and to wildlife habitat. Plants and soils of BVWs remove or detain sediments, nutrients, and toxic substances that occur in run-off and flood waters. Bordering vegetated wetlands are probably the Commonwealth's most important inland habitat for wildlife. The hydrologic regime, plant community composition and structure, topography, and water chemistry of BVWs provide important food, shelter, migratory and overwintering areas, and breeding areas for many birds, mammals, amphibians, reptiles, and insects.

The Peer Review Report noted that the revised plans dated April 29, 2019 addressed each of the recommendations made by the peer reviewer to the applicant with the exception of a wetland replication area. The Peer Review report recommends that the Commission require replication for the filled BVW since it is a requirement of the state Regulations for filling BVW.

DEP noted that any Order of Conditions should include monitoring conditions to document that the altered areas are at least 75% established with indigenous wetland species within two growing seasons, that any invasive plants in the impacted area are identified and removed, and that the Commission reserves the right to require additional measures to achieve compliance should the altered area fail to become established (i.e. a planting plan).

Based on my assessment of the revised plans dated May 22, 2019, approximately 2:1 replication has been proposed.

If the Commission decides to issue an Order of Conditions, my recommended conditions are as follows:

- A. General Conditions
 - 1. ACC-1

2. With respect to all conditions except____, the Conservation Commission designates the Conservation Agent as its agent with full powers to act on its behalf in administering and enforcing this Order.
 3. REC-1
 4. REC-2
 5. ADD-1
 6. ADD-4b
 7. STO-4
 8. STO-5
 9. WET-2
- B. Prior to Construction
1. REC-3
 2. Notify the Conservation Agent 72 hours prior to beginning work
 3. EMC-1
 4. DER-1
 5. PCC-1
- C. During Construction
1. STO-1
 2. MAC-3
 3. All equipment shall be inspected regularly for leaks. Any leaking hydraulic lines, cylinders, or any other components shall be fixed immediately.
 4. DEB-1
 5. Move the debris piles as noted on the plans dated May 22, 2019 greater than 25 feet from the edge of the wetland and install an erosion barrier to prevent impact to the resource area.
 6. BLD-2
 7. BLD-3
 8. BLD-4
 9. SIL-4
 10. LOW-5
- D. After Construction/In Perpetuity
1. COC-1
 2. Post-construction photographs demonstrating compliance with this Order, including established vegetation where required.

Perpetual Conditions

The below conditions do not expire upon completion of the project.

3. CHM-2 This condition shall survive the expiration of this Order, and shall be included as a continuing condition in perpetuity on the Certificate of Compliance.
4. DER-4
5. There shall be no additional alterations of areas under Conservation Commission jurisdiction, which includes the 100-foot buffer zone, without the required review and permit(s). This condition shall survive the expiration of this Order,

and shall be included as a continuing condition in perpetuity on the Certificate of Compliance.

6. REP-12
7. Maintenance of the culvert shall be the responsibility of the property owner to ensure the hydrologic connection between the wetland areas is maintained and that water is able to flow seasonally or otherwise appropriately. This condition shall survive the expiration of this Order, and shall be included as a continuing condition in perpetuity on the Certificate of Compliance.

E. Wetland Replication/Restoration

1. SIL-3
2. SIL-5
3. REP-1
4. REP-2
5. REP-3
6. REP-8
7. REP-9
8. The above conditions shall apply not only to the wetland replication but also to the restoration of the impacted wetland resource area.
9. Should the impacted wetland area not successfully re-establish within two growing seasons of cessation of impact, the Commission reserves the right to require additional measures necessary to achieve successful restoration.

CON-19-052: 7 Union Street

Notice of Intent filed by Fairhaven Shipyard Companies, Inc. for the construction of a pile-supported platform, gangway, and pile-anchored float to provide access to navigable waters at the property located at 7 Union Street, Assessors Map 7, Lot 11. Work to take place in Land Under the Ocean, Designated Port Area, and Land Containing Shellfish.

MassDEP File #: SE 023-1298

Documents Reviewed: Notice of Intent Submission and associated documents, 310 CMR 10.00, Fairhaven Wetlands Bylaw

Resource Areas: Designated Port Area, Land Under Ocean, Land Containing Shellfish

Significance: Land under the ocean in designated port areas is likely to be significant to marine fisheries, storm damage prevention, and flood control. Many species of marine fish may inhabit port areas. When a proposed project involves dredging, filling, removing, or altering land under the ocean in designated port areas, the issuing authority shall presume that the area is significant to marine fisheries, storm damage prevention, and flood control.

MA DMF reviewed the NOI and, based on the scope of work as currently proposed, had no recommendations for sequencing, timing, or methods that would avoid or minimize impact.

Town Counsel noted that, "The Massachusetts wetlands regulations provide that an order of condition does not grant any property rights, and does not authorize an invasion of property rights. Based on that regulation, I believe the Town and your client can agree that the acceptance of this notice of intent and the issuance of an order of conditions, by the Fairhaven Conservation Commission, does not constitute a waiver or release of the Town's claim to ownership of the [basin]."

If the Commission decides to close the public hearing and issue an Order of Conditions, my recommended conditions are as follows:

A. General Conditions

1. ACC-1
2. With respect to all conditions except_____, the Conservation Commission designates the Conservation Agent as its agent with full powers to act on its behalf in administering and enforcing this Order.
3. REC-1
4. REC-2
5. ADD-1
6. ADD-4b
7. STO-4
8. This Order of Conditions does not constitute a release or waiver of, and is not intended in any way to impair, the Town's claim to ownership of the property at the location for which this Order of Conditions is issued.

B. Prior to Construction

1. REC-3
2. Notify the Conservation Agent 72 hours prior to beginning work
3. EMC-1
4. DER-1
5. CAP-3
6. The applicant shall pay a shellfish mitigation fee of \$100.

C. During Construction

1. STO-1
2. DRG-3
3. MAC-1
4. MAC-3
5. All equipment shall be inspected regularly for leaks. Any leaking hydraulic lines, cylinders, or any other components shall be fixed immediately.

D. After Construction

1. COC-1
2. COC-2

Notice of Intent filed by Agostinho Pinto for the razing of the existing dwelling and garage and construction of a new flood zone-compliant single-family dwelling at the property located at 25 Abbey Street, Assessors Map 6, Lot 102. Work to take place in Land Subject to Coastal Storm Flowage/Zone VE and Buffer Zone to Bordering Vegetated Wetland

MassDEP NOI File #: SE 023-1300

Documents Reviewed: NOI Submission and associated documents, 310 CMR 10.00, Fairhaven Wetlands Bylaw

Resource Areas: Land Subject to Coastal Storm Flowage (LSCSF) Zone VE, Buffer Zone to Bordering Vegetated Wetland

Significance: Land subject to coastal storm flowage are likely to be significant to flood control and storm damage prevention. LSCSF provides a temporary storage area for flood water and can slow down storm surge flood waters, reducing damage to both man-made and natural features. Buffer zone to bordering vegetated wetland is significant due to its importance in protecting the wetland and allowing the wetland to provide its ecosystem services. Buffer zones are important for flood control, storm damage prevention, protection of public and private water supply, and protection of wildlife habitat. Vegetation in the buffer zone plays a crucial role in maintaining water temperature and chemistry of the wetland. Additionally, most wetland-dependent wildlife also depends on an undisturbed upland buffer zone for cover, habitat, food sources, pollution filtration, temperature control, and other functions and values.

In general, it appears this project will reduce the amount of impervious surface on the property.

If the Commission decides to issue an Order of Conditions, my recommended conditions are as follows:

A. General Conditions

1. ACC-1
2. With respect to all conditions except_____, the Conservation Commission designates the Conservation Agent as its agent with full powers to act on its behalf in administering and enforcing this Order.
3. REC-1
4. REC-2
5. ADD-1
6. ADD-4b
7. STO-4

B. Prior to Construction

1. CAP-1
2. CAP-3
3. DER-1
4. REC-3
5. Notify the Conservation Agent 72 hours prior to beginning work
6. PCC-1
7. EMC-1

8. SIL-5
9. LOW-2
- C. During Construction
 1. STO-1
 2. STO-3
 3. STO-5
 4. SIL-3
 5. SIL-8
 6. MAC-3
 7. All equipment shall be inspected regularly for leaks. Any leaking hydraulic lines, cylinders, or any other components shall be fixed immediately.
 8. DEB-1
 9. BLD-1
 10. BLD-3
 11. BLD-4
 12. RUN-2
 13. REV-1
 14. REV-3
 15. WAS-1
 16. WAS-3
- D. After Construction/In Perpetuity
 1. COC-1

Perpetual Conditions

The below conditions do not expire upon completion of the project.

2. CHM-3
3. DER-4

CON-19-058: 68 Bay Street

Request for Determination of Applicability filed by Cecelia Demello for the installation of a fence, rebuild and extension of the front porch, replacement of existing deck landing with pavers, addition of a landing for back deck, and addition of seashells at the property located at 68 Bay Street, Assessors Map 28A, Lot 413. Work to take place in Land Subject to Coastal Storm Flowage/Zone VE and Zone AE.

Documents Reviewed: RDA submission and associated documents, 310 CMR 10.00, Fairhaven Wetlands Bylaw

Work Description from RDA: Change grade by adding seashells to front of house on side of driveway; putting in vinyl fence front, sides, and two panels in back of house; extending front porch and rebuilding existing one; adding cement footers to back of house for deck landing

Resource Areas: Land Subject to Coastal Storm Flowage (LSCSF)/Zones VE and AE

Significance: Land subject to coastal storm flowage are likely to be significant to flood control and storm damage prevention. LSCSF provides a temporary storage area for flood water and

can slow down storm surge flood waters, reducing damage to both man-made and natural features.

Comments: The overall amount of impervious surface is not substantially changing. The applicant indicated to me that all the work proposed regarding the porch and deck would be done via sonotubes or utilizing existing footings. It appears the location of the deck is moving from the side to the rear of the house rather than expanding and the proposed location for shells is already existing lawn and no vegetation is being removed at this time.

Question for Applicant: You have noted on the plan that you would like to plant beach grass/shrubs along the side of the property near the proposed beach shells. What are you intending to plant?

Recommendation: Negative 2 Determination with understanding that the applicant needs to get all the appropriate permits from other boards.

CON-19-059: 32 Alder Street

Request for Determination of Applicability filed by Alan Vaynerchuck for the construction of a stone wall at the edge of existing lawn at the property located at 32 Alder Street, Assessors Map 43A, Lot 14. Work to take place in Land Subject to Coastal Storm Flowage/Zone VE and Buffer Zone to Coastal Beach.

Documents Reviewed: RDA submission and associated documents, 310 CMR 10.00, Fairhaven Wetlands Bylaw

Work Description from RDA: Building a granite and cement stone wall 30 inches high, 18 inches wide, 94 feet long at edge of lawn area on the west side of the property

Resource Areas: Land Subject to Coastal Storm Flowage (LSCSF) Zone VE, Buffer Zone to Coastal Beach

Significance: Land subject to coastal storm flowage are likely to be significant to flood control and storm damage prevention. LSCSF provides a temporary storage area for flood water and can slow down storm surge flood waters, reducing damage to both man-made and natural features. Buffer zone to coastal beach is significant due to its importance in protecting the coastal beach. Buffer zones are important for flood control, storm damage prevention, and protection of wildlife habitat.

Recommendation: Negative 3 Determination with the following conditions: CAP-3, at no point shall work occur on the beach.

CON-19-060: 30 Hitch Street

Request for Determination of Applicability filed by John Logan for the installation of a pre-fabricated 6' x 8' wooden shed on 4 sonotubes at the property located at 30 Hitch Street, Assessors Map 8, Lot 46. Work to take place in Land Subject to Coastal Storm Flowage/Zone AE.

Documents Reviewed: RDA submission and associated documents, 310 CMR 10.00, Fairhaven Wetlands Bylaw

Work Description from RDA: The proposed project is the installation of a pre-fabricated 6' x 8' wooden shed. The shed would be placed on 4 concrete sonotubes installed at the 4 shed corners. The holes will be dug to 4' below grade, bottoms lined with crushed stone, then sonotubes will be filled with concrete and set to raise the shed 1' off the ground. The shed will be sewed to the sonotubes with embedded eye-bolts. All work to be done by hand.

Resource Areas: Land Subject to Coastal Storm Flowage (LSCSF) Zone AE

Significance: Land subject to coastal storm flowage are likely to be significant to flood control and storm damage prevention. LSCSF provides a temporary storage area for flood water and can slow down storm surge flood waters, reducing damage to both man-made and natural features.

Recommendation: Negative 2 Determination

CON-19-061: 36 Monondach Avenue

Request for Determination of Applicability filed after-the-fact by Naji Elkhoury for the reconstruction of a 10' x 28' deck at the property located at 36 Monondach Avenue, Assessors Map 42A, Lot 229. Work to take place on Barrier Beach and in Land Subject to Coastal Storm Flowage/Zone VE.

Documents Reviewed: RDA submission and associated documents, 310 CMR 10.00, Fairhaven Wetlands Bylaw

Work Description from RDA: The homeowner had contracted with a contractor and paid the contractor to obtain a permit. The contractor was paid a \$900.00 payment to get a permit and failed to do so. The contractor then proceeded to tear down the existing 10' x 28' deck and proceeded to rebuild the deck. The building department proceeded with a cease and desist order. The homeowner now has a deck constructed at about 85% completed and has started litigation with the contractor originally hired. Finish the 10' x 28' deck.

Resource Areas: Barrier Beach, Land Subject to Coastal Storm Flowage (LSCSF)/Zone VE

Significance: Barrier beaches are significant to storm damage prevention and flood control and are likely to be significant to the protection of marine fisheries and wildlife habitat. Barrier beaches protect landward areas because they provide a buffer to storm waves and to sea levels elevated by storms and climate change. Barrier beaches protect highly productive wetlands such as salt marshes from wave action.

Questions for Applicant: Were the front stairs pictured in the submitted pictures also part of the recent work? If so, what is supporting them? Were any new footings put in for the deck? How will the deck be finished? Will there be any ability for water to run underneath the deck?

Recommendation: Negative 2 Determination

Violations/Enforcement Orders/Cease and Desist Notices:

Assessors Map 15, Lot 43 (owner resides at 3 North Street) – clearing of vegetation in the buffer zone

Comments: Site visit was conducted on 5/28/2019 and the following was noted: carpet needs to be removed, brush on top of hard pack next to fence needs to be removed, brush pile next to hard pack needs to be removed, garbage can needs to be removed, garbage on ground needs to be removed

Recommendation:

3 North Street (SE 023-1273)

Comments: site visit conducted on 5/28/2019 and the following was noted: upper bank has been completely destabilized and fencing is starting to be installed in front of destabilized bank, the grading as laid out in the plan has not been followed, some material stored outside of limit of work and not on driveway

Communication with Steve Gioiosa indicated that he was going to survey what has been put in place already and make some recommendations as to next steps in order to be in compliance.

55 Bayview Avenue

Comments/Recommendation: Received communication from DPW regarding driveway apron and have incorporated that into the amended enforcement order which reads as follows:

This serves as a second amendment to the Enforcement Order issued August 9, 2018, the first amendment being on April 8, 2019.

A restoration plan shall be filed with the issuing authority on or before July 1, 2019 for the following:

- A. By July 31, 2019, remove all additional gravel and asphalt along the right side of the house between the driveway and the fence and restore with clean sand from a location approved by the Conservation Commission or its agent.
 1. Do not cut or remove beach grasses from this area as they fill in
 2. Not later than July 31, 2019, the restored area shall be planted with American Beach Grass (*Ammophila breviligualta*). Beach Grass plugs shall be installed not less than 8-inches on center, shall be fertilized with a slow-release fertilizer, and watered as necessary.
 3. Respondent shall be responsible for monitoring and maintaining the Beach Grass plantings for three (3) years after completion of the stabilization effort. In the event that any of the plants die within that three (3) year period, Respondent shall replace the dead plants in accordance with A2 above.

- B. Remove existing hardpack along the left side of the garage driveway and replace with shells by July 31, 2019. At no point shall this area be impervious now or in the future.
 - 1. Per DPW comment, the driveway apron only shall be either asphalt or concrete 8 feet back from the street to ensure that the shells from the driveway do not spill into the roadway.
- C. Existing paved driveways as shown on the attached site plan and verified by photos from Google Maps may be replaced/repaved in the exact same footprint.
 - 1. Stake out the extent of the driveways and call the Conservation Agent to schedule an inspection before work is started.
- D. At the completion of work outlined in A, B, and C above, call the Conservation Agent no later than August 5, 2019 to schedule an inspection to be completed no later than August 16, 2019.
- E. Any manmade debris on the beach area on the Respondent's property may be cleaned up by hand. No natural debris may be cleared.
 - 1. No heavy equipment on the beach at any time now or in the future.
- F. Any work on the portion of the beach owned by the Town of Fairhaven requires permission from the Conservation Commission.
- G. Any other work requires the filing of a Notice of Intent.
- H. The Conservation Commission, its employees, and its agents shall have a right of entry to inspect or compliance with the provisions of this Enforcement Order
- I. The Commission reserves the right to impose additional conditions on any or all portions of this project that could impact an area of statutory interest under the Act and/or the Fairhaven Wetlands Bylaw.
- J. The restoration plan shall be in compliance with the Performance Standards for Coastal Beaches (310 CMR 10.27(3-7)) and with the Performance Standards for Coastal Dunes (310 CMR 10.28 (3-6)).
- K. The Enforcement Order and associated Restoration Plan shall be recorded at the Registry of Deeds prior to work commencing.
- L. Appeals of Enforcement Orders: Enforcement Orders issued by a Conservation Commission can only be appealed to the Superior Court, not to DEP. Many appeals of Enforcement Orders will be brought pursuant to the "certiorari" statute, G.L. c.249, §4. Such appeals must be filed in Superior Court within sixty (60) days of the issuance of an Order. A certiorari proceeding is a limited review of the Commission's record—all proceeding notes, minutes, and transcripts, plus information and documents obtained and issued by the Commission. The burden of proof is on the plaintiff (i.e. the violator bringing the appeal) to show that the Commission either failed to follow proper procedures, or that its decision was arbitrary or capricious or not based on substantial evidence. Once the 60-day appeal period has passed, the Enforcement Order is considered final and non-compliance with the Enforcement Order may result in the Commission taking the Respondent to court.

104 Fir Street

Comments: Trenching in a wetland

Recommendation: Homeowner shall return removed soils to the locations they were removed from. No further digging in the wetland shall occur. Any future work requires the filing of a Notice of Intent or a Request for Determination of Applicability. Homeowner may plant native shrubs as planned.

40 Wapatma Lane

Comments: Horse paddock has direct access to wetland and potential vernal pool, should be addressed to avoid continuing contamination of the wetland system. Additionally, it appears that some fill was dumped into the paddock within the buffer zone to the wetland.

Recommendation: File within 60 days to address proper horse manure management and access to wetland. If no filing within 60 days, Commission could consider issuing an Enforcement Order.

Town Beach on West Island

Comments: Waiting on report from the wetland scientist, but brief communication indicated that the snow and ice over the winter may have concealed the true severity of damage.

Recommendation: Pending report from wetland scientist, but it sounds as if a restoration plan will be needed.

General Business:

- a) Payment of Bills: 2 bills
- b) Hedge Street: Email from Vinnie
- c) Notice of Intent Filing Fees clarification: Notice of Intent bylaw fees calculated as WPA fees are calculated or flat fee?

Other towns vary between matching the state fees, flat fees, and fees calculated by activity.